(1)

Supreme Court, U.S.

01 243 AUG 8 - 2001

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

Mike Bartoletti, Petitioner

v.

The Supreme Court of Montana, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITION FOR WRIT OF CERTIORARI

R. Lewis Brown, Jr., P.C.
Attorney for Mike Bartoletti
Post Office Box 3647
Butte, Montana 59702-3647

Telephone: 1-406-494-8822

14PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Montana Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court.

2. Whether The Montana Supreme Court has decided an important Federal Question in a way that conflicts with relevant decisions of this Court.

3. Whether The Montana Supreme Court erred in holding that the General Railroad Right-of-Way Act of 1875 was dispositive of this case.

4. Whether The Montana Supreme Court's decision unlawfully deprives Mike Bartoletti of his property contrary to Articles V and XIV of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties to the proceedings in The Montana Supreme Court are: PHILIP JOHN MILANOVICH, Plaintiff and Respondent, vs. STOJAN JANICICH, MARY JANICICH; NATALIE JANICICH MARUSICH; LOUISE JANICICH OBRADOCICH; DELORES JANICICH; LOUIS JANICICH; IGNATZ MILLINACH; BLAZO (or BOB) KILBARDA; MICHAEL J. HENNESSEY; WILLIE D. HENNESSEY; THOMAS COUGHLIN, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; A&K RAILROAD MATERIALS, MIKE BARTOLETTI; DAN O'NEILL; and all other persons unknown claiming or who might claim any right, title, estate, or interest in lien or encumberance upon the real property described in the complaint adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, Defendants and Appellants.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
List of Parties to the Proceedings in the Court Below	2
Table of Authorities	4
Opinions Below	5
Statement of Jurisdiction	6
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved	6
Statement of Case	6
Reasons for Granting Writ	10
Conclusion	13
Appendix:	
A. Opinion of Montana Supreme Court	1
B. Judgment and decree of Quiet Title Montana Second Judicial District Court	8
C. Other Appropriate Materials	12

TABLE OF AUTHORITIES

CASES

Chicago, Milwakee and St. Paul Railway Company of Idaho v. United States, 244 U.S. 351, 37 S. Ct. 625, 61 L.Ed. 1184. (1917)

Lilienthal v. Southern California Railroad Co. (1893) CCA - Cal., 56 F. 701

Sullivan v. Neel -, (1937) 73 P. 2d 206

Minneapolis, St. Paul and Pacific Railroad Co. v. Doughty (1908) 208 U.S. 251, 28 S. Ct. 291, 52 L.Ed 474.

U.S. CONSTITUTIONAL PROVISIONS

Article V
Article XIV

STATUTES

Mining Law Act of 1872. 30 USC § § 21-28

Right of Way Act of 1875 43 USC § § 934-939.

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

Mike Bartoletti, Petitioner,

v.

The Supreme Court of Montana, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner, Mike Bartoletti, respectfully prays that a Writ of Certiorari issue to review the judgment of The Supreme Court of Montana entered on April 18, 2001, and the Order denying the petition for rehearing entered on May 10, 2001. The Court's judgement affirmed the Judgement and Decree of Quiet Title of the Montana Second Judicial District Court of Silver Bow County entered on January 12, 2000. Said Judgement and Decree quieted the title of Plaintiff Philip John Milanovich to Lot 4, Section 30, T2N, R7W, MPM, and barred and restrained Defendant Mike Bartoletti from asserting any claim whatsoever in or to Lot 4 adverse to Milanovich.

OPINIONS BELOW

The Supreme Court of Montana has issued a judgement and opinion in this case which appears in the Appendix to this petition at page 1. The opinion has not been printed pursuant to the Court's order therein.

A copy of the judgment and decree of the Montana

Second Judicial District Court also appears in the Appendix at page 8.

STATEMENT OF JURISDICTION

Statement of the basis for jurisdiction in this Court is:

i. The judgment of The Montana Supreme Court was entered April 18, 2001.

ii. The Petition for Rehearing was denied May 10, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The case involves Article V of the United States Constitution providing in part that "No person ... shall be deprived of ... property without due process of law...", and Article XIV, Section 1, to-wit: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...".

The full pertinent provisions of Article V and Article XIV are printed in the Appendix at page 21.

STATEMENT OF CASE

In 1906, The Chicago, Milwaukee & St. Paul Railway Company of Montana (a Montana corporation and subsidiary of The Chicago, Milwaukee, St. Paul and Pacific Railroad Company) purchased a strip of land from the owners of the South Star Lode Mining Claim (an unpat-

ented lode mining claim located on April 30, 1901). This land was one hundred (100') feet wide, being (50') feet wide on each side of the centerline of the railway, as it was then located, over and across the South Star Claim. The Railroad paid the sum of Three Hundred Thirty-One and 50/100ths ($331.50) Dollars for this strip of land.

On October 10, 1908, the Railroad purchased from the claim owners two (2) parcels of land lying on either side of its right-of-way, containing eight and 31/100ths (8.31) acres, more or less. This purchase was made for the sum of Nine Hundred Fifty-Five and 56/100ths (955.56) Dollars.

The stated purpose of this acquisition was to allow the Railroad to excavate and carry away earth, rock, gravel, or other materials for use on or along the railway lines (emphasis added) of the Company.

The Milwaukee operated continuously over this line of railway until October 25, 1982, when it ceased rail operations and sought bankruptcy Court protection. On October 24, 1983, Richard K. Ogilvie, as Trustee in the bankruptcy proceeding, conveyed the subject property to A. & K. Railroad Materials, Inc. A. & K. Railroad then conveyed it to the Petitioner, Mike Bartoletti, on June 27, 1989.

Previously, on March 14, 1917, the United States issued a homestead Patent to Joseph A. Gearing, conveying three hundred ten and 81/100ths (310.81) acres in Section 30. This conveyance included all of Lot 4, wherein the South Star Lode was located. The Patent contained no reservation to the Milwaukee for the portion of its railway line in Lot 4, nor was there any mention of the South Star Lode Claim therein.

Thereafter, the Milwaukee continued operating over its line in Lot 4 until it ceased business in 1982. During

this period, all property taxes due on the trackage therein continued to be assessed solely to and paid by the Milwaukee.

On November 26, 1968, Philip John Milanovich acquired title to Lot 4 as a devisee in the line of succession under the patent granted to Joseph A. Gearing in 1917. In 1980, he had a survey of the property made by Alpha Engineers Montana, Inc. The survey plat showed the Milwaukee's trackage in Section 30. In addition, the land surveyor remarked:

> A thorough search of records has not revealed any evidence of a right of way for the railroad ... the original patent on lot 4 indicates no exceptions, so there is only a prescriptive easement for this portion of the Milwaukee Road.

This Survey was filed in the office of the Silver Bow County Clerk and Recorder on June 30, 1980, as Certificate of Survey No. 177A (COS #177A).

In 1986 and following review of COS #177A, the Clerk and Recorder increased the Milanovich assessment to ninety-nine and 13/100ths (99.13) acres from the previous assessments of eighty-eight and 32/100ths (88.32) acres. This change reflected assessment of the Milwaukee trackage to Milanovich as the owner thereof.

In 1989, the double assessment of the Railroad land in Section 30 was discovered and the acreage was removed from Milanovich's assessment on October 5, 1989. Dr. Milanovich objected to the reduction of acreage assessed to him and instituted a Quiet Title action on June 29, 1990, in the Montana Second Judicial District Court of Silver Bow County (hereafter District Court).

In the District Court the Federal Questions raised were:

1. Whether the General Right-of-Way Act of 1875 was applicable in determining the ultimate status of the Milwaukee's railway line in Lot 4 of Section 30;

2. The impact of the Mining Law Act of 1872 on the real property conveyances of 1906 and 1908; and

3. Whether the actions of the Milwaukee in continuing to operate its railway line adversely to Gearing and his successors and solely pay all taxes levied thereon for a period of sixty-five (65) years until ceasing operations in 1982 resulting in ownership through adverse possession under Montana law.

The trial depended principally on resolution of these issues, and the transcript of proceedings is replete with testimony in this regard. (Relevant portions are reproduced in the Appendix at page 53).

Judge Mizner, in his Judgment and Decree of Quiet Title entered January 12, 2000, determined that the Right-of-Way Act applied to the dispute. He found that the Milwaukee's total acreage in Lot 4 became the property of Milanovich upon the Milwaukee's cessation of railroad operations. Thereafter, Bartoletti filed a Notice of Appeal to The Montana Supreme Court on January 31, 2000.

In The Montana Supreme Court the Federal Question again involved whether the General Railway Act applied to the Milwaukee and its line of railway in Lot 4. Bartoletti urged that it did not because:

1. The Mining Act of 1872 expressly reserved lands valuable for minerals;

2. Certain actions required of a Railroad to obtain its benefits were not taken by the Milwaukee;

3. The Railroad acquired its land by payment of monies that were substantial sums in 1906 and 1908;

4. The right-of-way was not reserved in the Gearing Patent as would have been done had 43 U.S.C. §937 been complied with by the Milwaukee; and

5. The Milwaukee had ripened its title following the Patent by adverse possession under Montana law.

After the Supreme Court ruled for Milanovich on April 18, 2001, Bartoletti filed a Petition for Rehearing on April 27, 2001. In this Petition Bartoletti again urged that subsequent to the Gearing Patent the Milwaukee ripened its title by adverse possession and as sole payer of all taxes levied on its acreage in Lot 4.

Further, in his Petition Bartoletti pointed out that the Court's decision not only deprived him of the railroad trackage, but also of the six plus (6+) acres alongside the tracks. This acreage was well in excess of the two hundred (200') feet right-of-way available under the 1875 Act.

The Petition for Rehearing was denied by the Court on May 10, 2001.

REASONS FOR GRANTING THE WRIT

This case is the consequence of erroneous assumptions as to the law applicable to the transactions of the Milwaukee in acquiring and establishing its trackage and

other property rights in Lot 4 of Section 30. This is all contrary to the evidence before it, made by the District Court and then the Montana Supreme Court. Thus an ill-founded and unjust result has been produced.

The District Court in its Findings of Fact and Conclusions of Law held that the Milwaukee had no recorded right-of-way over Lot 4 in Section 30. At the trial the Court received in evidence Defendant Bartoletti's Exhibit A, which was the Milwaukee's Right-of-Way and Track Map of its trackage in Lot 4. The Map was dated June 30, 1915, and the two (2) conveyances to it were recorded in Books 87 and 97 of the property records of silver Bow County, Montana. A Bureau of Land Management (BLM) Plat showing the Milwaukee trackage in lot 4 was also received in evidence as Defendant's Exhibit B.

In its Findings the District Court also held that the Milwaukee's right-of-way was granted pursuant to 43 U.S.C. §934. This conclusion is directly contrary to fact and law. There is no evidence in the case that the Milwaukee, in any way, sought to receive the benefits of the General Right-of-Way Act of 1875. This point is confirmed by the Gearing Patent of March 14, 1917, which did not reserve a right-of-way to the Railroad therein as would have occurred, had the Milwaukee proceeded under 43 U.S.C. §937.

The Montana Supreme Court in its Opinion and Decision of April 18, 2001, affirming the District Court's Judgment, accepted the argument that the Right-of-Way Act controlled the case. This was despite all of the evidence to the contrary and the plain provisions of the Act itself.

Neither the District Court nor the Supreme Court acknowledged or discussed Defendant Bartoletti's position concerning the Milwaukee's title, which was negated in the 1917 Patent. Bartoletti contended that the title was

revived after five (5) consecutive years of the Milwaukee's continued operations over its trackage adversely to the Patentee and his successors, and also as the sole payer of all taxes assessed against such right-of-way. In so doing, both the District Court and the Supreme Court imposed the Right-of-Way Act upon an unwilling subject.

In Bartoletti's Petition for Rehearing it was clearly shown that his title resulted from the 1906 and 1908 conveyances, The Milwaukee's sixty (60) years of adverse possession and ownership under Montana law, and the later two (2) conveyances in his chain of title. Further, in the Petition for Rehearing it was strongly represented to the Court that the Right-of-Way Act is designed only for entities that desire its benefits and thus is not intended for involuntary imposition on railroads by the courts.

The Petition also suggested to the Supreme Court the constitutional problems presented in its awarding land in excess of the Right-Of-Way easement boundaries to Milanovich.

Bartoletti urges, most respectfully, that there can be no moral or legal justification or authority for such action.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted this 6TH day of Aug. 2001.

R. LEWIS BROWN, JR., P.C.

By R. Lewis Brown Jr.

R. Lewis Brown, Jr.
Attorney for Petitioner
P.O. Box 3647
Butte, Montana 59702-3647
(406) 494-8822

(2)

Supreme Court, U.S.
FILED

APPENDIX

No 01 243 AUG 8 - 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

Mike Bartoletti, Petitioner

v.

The Supreme Court of Montana, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

PETITION FOR WRIT OF CERTIORARI

R. Lewis Brown, Jr., P.C.
Attorney for Mike Bartoletti
Post Office Box 3647
Butte, Montana 59702-3647

Telephone: 1-406-494-8822

75 pp

APPENDIX

No. 00-105

IN THE SUPREME COURT OF THE STATE OF MONTANA

2001 MT 65N

PHILIP JOHN MILANOVICH,

Plaintiff and Respondent,

v.

STOJAN JANICICH, MARY JANICICH, NATALIE JANICICH MARUSICH, LOUISE JANICICH OBRADOVICH, DELORES JANICICH, LOUIS JANICICH, IGNATZ MILLINACH, BLAZO (or BOB) KILIBARDA, MICHAEL J. HENNESSY, WILLIE D. HENNESSY, THOMAS COUGHLIN, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, A & K RAILROAD MATERIALS, MIKE BARTOLETTI, DAN O'NEILL, and all other persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint adverse to plaintiffs title thereto, whether such claim or possible claim be present or contingent,

Defendants and Appellants.

APPEAL FROM: District Court of the Second Judicial District, In and for the County of Silver Bow, The Honorable Ted L. Mizner, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

R. Lewis Brown, Jr., Attorney at Law, Butte, Montana

Brian T. Atcheson, Attorney at Law, Butte Montana

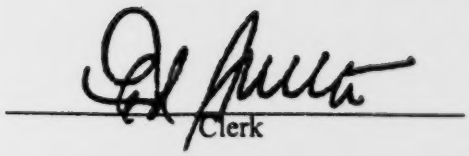
For Respondent:

Carl A. Hatch, Small, Hatch, Doubek & Pyfer, Helena, Montana 59624

Submitted on Briefs: October 19,2000

Decided: April 18, 2001

Filed:



Clerk

Justice Jim Regnier delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent but shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the Quarterly table of noncitable cases issued by this Court.

¶2 Philip John Milanovich filed an action to quiet title to real property in Silver Bow county, Montana. Mike Bartoletti and Dan O'Neill appeared to contest the quiet title action. The District Court quieted title in favor of Milanovich and also granted his right to a prescriptive easement. Bartoletti and O'Neill appeal and present the following questions:

¶3 1. Did the District Court err in quieting title to Lot 4, Section 30, T.2 N., R.7 W., M.P.M., Silver Bow County, Montana, in favor of Milanovich?

¶4 2. Did the District Court err in determining that Milanovich had a prescriptive easement over roads across the Ernest Lode?

¶5 We affirm.

BACKGROUND

¶6 On November 26, 1968, Philip John Milanovich acquired title by deed to Lot 1, Section 29, and Lots 3 and 4, Section 30, T.2N.,R.7W., M.P.M., as shown on C.O.S. #177-A. Milanovich surveyed and fenced property and filed the survey with the Clerk and Recorder of Silver Bow County in June 1980. The survey showed that the Chicago, Milwaukee, St. Paul, and Pacific Railroad (hereinafter Milwaukee Railroad) had railroad tracks curving through Lot 4. Milanovich continuously paid taxes on the property since his original date of ownership.

¶7 On October 5, 1989, Milanovich received a letter from the butte-Silver Bow County Appraisal supervisor indicating that his tax assessment on his property was being reduced from 99.13 acres to 88.32 acres, and the difference of 10.81 acres was being assessed to a & K Railroad Materials, Inc., as owners of the property. Milanovich protested the action by the assessor and continued to pay taxes on 99.13 acres. Milanovich

subsequently filed an action to quiet title to the full 99.13 acres.

¶8 Defendant Mike Bartoletti disputes Milanovich's ownership of the 10.81 acres in Lot 4, Section 30, which formerly was used by Milwaukee Railroad as a right-of-way. Milwaukee Railroad, through its trustee in bankruptcy, deeded its interest in the property to A & K Railroad Materials, Inc., by quitclaim deed, and Bartoletti subsequently purchased the property by quitclaim deed from A & K Railroad Materials, Inc.

¶9 Defendant Dan O'Neill also disputes Milanovich's ownerships. O'Neill owns a patented mining claim known as the Ernest Lode which is located entirely within the boundaries of Milanovich's property as shown on C.O.S. #177-A. O'Neill and Milanovich have had a long standing dispute regarding Milanovich's right to use roads that cross the Ernest Lode. Milanovich sought a prescriptive easement across two roads in the Ernest Lode which proceed off of the existing road as shown on C.O.S. #177-A, one leading east to Lot 1, Section 29, and one leading west to Lot 3, Section 30.

¶10 The District Court conducted a hearing addressing the issues between Milanovich and Bartoletti on July 17, 1998, and heard the issues between Milanovich and O'Neill on November 20, 1998. On December 8, 1999, the Court filed its findings of fact and conclusions of law. The District Court entered its Judgment and Decree of Quiet Title on January 17, 2000, quieting title to Lot 1, Section 29, Lot 3, Section 30, and Lot 4, Section 30 as described on C.O.S. #177-A in favor of Milanovich and sustaining Milanovich's prescriptive easement across Ernest Load on the road leading to Lot 1, Section 29, and the road leading to Lot 3, Section 30. Bartoletti and O'Neill appeal.

STANDARD OF REVIEW

¶11 An action to quiet title is a proceeding in equity. In equity cases, we apply the standard of review set form in § 3-2-204(5), MCA, which requires this Court to determine all of the issues in the case and to do complete justice. *Montana Eart Resources Ltd. Partnership v. North Blaine Estates, Inc.,* 1998 MT 254, ¶ 17,291 Mont. 216, ¶ 17,967P.2d 376, ¶ 17.

ISSUE ONE

¶12 Did the District Court err in quieting title to Lot 4, Section 30, T.2 N., R.7W., M.P.M., Silver Bow county, Montana, in favor of Milanovich?

¶13 Milanovich contends that he and his predeessors in interest enjoyed possession and ownership of Lot 4, Section 30, from the time of the original patent to Joseph A. Gearing on March 14, 1917, subject only to a right-of-way of the Milwaukee Railroad granted pursuant to 43 U.S.C. § 934. Milanovich further contends that the Milwaukee Railroad abandoned its right-of-way across Lot 4, Section 30, prior to October 1983.

¶14 Bartoletti argues that the interest in that section of land was legally conveyed to him via quitclaim deed by A & K Railroad Materials, Inc. He argues that A & K Railroad Materials, Inc., purchased its interest from Milwaukee Railroad which acquired title through a good faith purchase from an original mining claimant.

¶15 The District Court concluded that Milanovich has full legal ownership of the disputed property. We agree. At no time did the Milwaukee Railroad, or its predecessors in interest, receive a patent to the land it used as a right-of-way. The Milwaukee Railroad had a right-of-way that was a mere possessory interest for as long as it operated the railroad. *See* 43 U.S.C. §§ 934-

938 (1875 Railroad Right of Way Act). When it abandoned operations, the full right to the property reverted back to the United States. Thus, Milanovich holds full title to the property because he succeeded to the rights of the original patentee.

§16 We conclude that the District Court did not err in quieting title to Lot 4, Section 30, T.2 N., R.7W., M.P.M., Silver Bow County, Montana, in favor of Milanovich.

ISSUE TWO

§17 Did the District Court err in determining that Milanovich had a prescriptive easement over roads across the Ernest Lode?

§18 Milanovich contends that he and his predecessors have used two roads through the Ernest Lode openly, visibly, notoriously, continuously, adversely, and exclusively under a claim of right, and without permission from anyone, for a period of more than 50 years. O'Neill contends that Milanovich has not utilized the roads and does not have the right to utilize the roads that cross through his property. The District Court concluded that Milanovich had a right to use the existing roads and that his continued use ripened into a prescriptive easement for the required statutory period. We agree.

§19 A party claiming an easement by prescription must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement for the full statutory period of five years. *See* § 70-19-404, MCA; *see also Unruh v. Tash* (1995), 271 Mont. 246,250, 896 P.2d 433, 435. Even though conflicting evidence was presented as to the validity of the prescriptive easement, testimony by Milanovich with the presentation of aerial photographs was substantial evidence for the District Court to properly conclude that the requirements for the creation

of a prescriptive easement had been fulfilled. *See Hagfeld v. Mahaffey* (1978), 176 Mont. 16, 22, 575 P.2d 915, 919. We conclude that the District Court did not err in determining that Milanovich had proven the existence of a prescriptive easement to the two roads through the ernest Lode.

¶20 Affirmed.

We Concur:

Justice

Chief Justice

Justices

MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY

* * * * * *

Cause No. 90-C-262

PHILIP JOHN MILANOVICH,

Plaintiff,

JUDGMENT AND DECREE
OF QUIET TITLE

vs.

STOJAN JANICICH and MARY JANICICH, his wife; NATALIE JANICICH MARUSICH; LOUISE JANICICH OBRADOVICH; DELORES JANICICH; LOUIS JANICICH; IGNATZ MILLINACH; BLAZO (or BOB) KILIBARDA; MICHAEL J. HENNESSY and WILLIE D. HENNESSY, his wife; THOMAS COUGHLIN; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; A & K RAILROAD MATERIALS; MIKE BARTOLETTI; DAN O'NEILL; and all other persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent,

Defendants.

* * * * * *

Having made its Findings of Fact and Conclusions of Law on December 1, 1999, which were duly filed by the Clerk of Court on December 8, 1999, the Court now enters its Judgment and Decree of "Quiet Title in favor of the Plaintiffs and against the Defendants, both known and unknown, as follows:

1. The file shows that:

a) Personal service of the Summons and Complaint was made upon Defendants, Mike Bartoletti; Dan O'Neill; Chicago Milwaukee, St. Paul and Pacific Railroad Company; A & K Railroad Materials; Louis Janicich; Deloris Janicich; and Louise Janicich Obradovich.

b) Summons for Publication was published in the manner and form and for the time required by law upon the Defendants, Stojan Janicich; Mary Janicich; Natalie Janicich Marusich; Ignatz Millinach; Blazo (or bob) Kilibarda; Michael J. Hennessy; Willie D. Hennessy; Thomas Coughlin; and all other persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the road property subject of this action adverse to Plaintiff's ownership or any cloud upon Plaintiff's title.

c) Mike Bartoletti and Dan O'Neill appeared and set forth their claims.

d) The default of all other Defendants was entered by the Clerk of Court.

e) Plaintiff has used due diligence to discover

the names and address or places of residence of all persons who might have claimed any interest in the subject real property.

f) Good and sufficient notice of the pendency of this action was filed in the office of the Clerk and Recorder of Silver Bow County.

2. The Court made Findings of Fact and Conclusions of Law on December 1, 1999 and hereby incorporates them into this judgment and decree as if they were fully set forth herein.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. Plaintiff, Philip John Milanovich is the owner in fee simple of real property in Silver Bow County, State of Montana, particularly described as follows:

Township 2 North, Range 7 West

Section 29: Lot 1
Section 30: Lot 3 and Lot 4
All as particularly designated and described on Certificate of Survey #177-A filed with the Clerk and Recorder of Silver Bow County. This survey establishes the true boundaries.

II. Plaintiff's title to the above-described property is free and clear from all claims, rights, titles, estates, interests, liens or encumbrances of the Defendants, or any of them, and none of the Defendants, nor any of them, have any right, title, estate or interest in, or lien or encumbrance upon, the above-described property (except the right to use the road as hereafter more fully set forth), and all claims of the Defendant, or any of them, to the above-described property are null, void, extinguished and of no effect.

III. Plaintiff's fee simple title is hereby forever quieted and the Defendants, and each of them, are forever barred and restrained from asserting any claim whatsoever in or to said described property adverse to Plaintiff.

IV. Plaintiff and all Defendants have a right free from objection, interference or limitation to use the road as shown on Certificate of Survey #177-A as it enters Lot 3 Section 30 from Section 19 on the north, then proceeds south across Lot 3 Section 30, across the Ernest Lode, and again across Lot 3 Section 30 before it exits Lot 3 Section 30 on its south boundary through the Bartoletti gate to Lot 6 Section 6.

V. Plaintiff Philip John Milanovich, his heirs, successors and assigns, have a right by prescription to travel the roads across the Ernest Lode M.S. 8839 which proceed off the existing road as shown on Certificate of Survey #177-A, one leading easterly then northerly to Lot 1, Section 29, and one leading south-westerly to Lot 3 Section 30.

VI. The Plaintiff is entitled to costs from the defendants.

January 11, 2000

/s/ TED L. MIZNER
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY

* * * * * *

Cause No. 90-C-262

PHILIP JOHN MILANOVICH,

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

vs.

STOJAN JANICICH and MARY JANICICH, his wife; NATALIE JANICICH MARUSICH; LOUISE JANICICH OBRADOVICH; DELORES JANICICH; LOUIS JANICICH; IGNATZ MILLINACH; BLAZO (or BOB) KILIBARDA; MICHAEL J. HENNESSY and WILLIE D. HENNESSY, his wife; THOMAS COUGHLIN; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; A & K RAILROAD MATERIALS; MIKE BARTOLETTI; DAN O'NEILL; and all other persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent,

Defendants.

* * * * * *

This matter came before the Court on a bench trial on July 17, 1998. Carl Hatch appeared on behalf of the Plaintiff and Brian T. Atcheson appeared on behalf of Defendant O'Neil and R. Lewis Brown appeared on

behalf of the Defendant Bartoletti. Counsel have submitted Proposed Findings and Conclusions and supporting memoranda. The Court being fully advised in the premises does hereby enter the following:

Upon review of all of the evidence the Court finds that there is substantial evidence to support the Plaintiff's contentions and therefore adopts the Plaintiff's Findings and Conclusions as the Court's own Findings and Conclusions set forth below.

FINDINGS OF FACT

1. This action by Plaintiff, Philip John Milanovich, seeks to quiet title to real property in Silver Bow County, Montana, particularly described as follows:

Township 2 North, Range 7 West

Section 29: Lot 1
Section 30: Lot 3 and Lot 4
All as particularly designated and described on Certificate of Survey #177-A filed with the Clerk and Recorder of Silver Bow County. This certificate of survey establishes the actual boundaries.

2. Philip John Milanovich was granted the described property by deed dated November 26, 1968 and recorded September 12, 1979 on Roll 23 Card 92.

3. Since November 26, 1968 Philip John Milanovich has claimed ownership of the above-described property and has actually possessed and occupied the same exclusively, openly, notoriously, visibly, adverse, and hostile to any other claim or interest except that of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company during the period that said railroad used the right-of-way across Lot 4 Section 30 for railroad purposes.

4. There is no dispute concerning Philip John Milanovich's ownership of Lot 1 Section 29 and Lot 3 Section 30, nor, any dispute concerning the boundaries of Lot 1 Section 29, Lot 3 Section 30, Lot 4 Section 30 and the Ernest Lode M.S. 8839 as located and established by the surveyor and as designated and described on Certificate of Survey #177-A filed with the Clerk and Recorder of Silver Bow County.

5. The dispute Philip John Milanovich has with Defendant, Mike Bartoletti, is with regard to ownership of that specific land in Lot 4 Section 30 used by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company as a right-of-way.

6. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company had no recorded right-of-way across Lot 4 Section 30.

7. Philip John Milanovich and his predecessors in interest enjoyed possession and ownership of Lot 4 Section 30 from the time of the original patent to Joseph a. Gearing on March 14, 1917, subject to the right-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company granted pursuant to 43 USC § 934.

8. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company ceased operating in the State of Montana and abandoned its right-of-way across Lot 4 Section 30 prior to October 1983.

9. By quit claim deed from Richard B. Ogilvie, as Trustee in bankruptcy, dated October 24, 1983, the interest of the Chicago, Milwaukee, St. Paul and Pacific Railroad in Lot 4, Section 30, was purportedly conveyed to A & K Railroad Materials, Inc. said deed recorded on Roll 61 Card 241.

10. By quit claim deed from A & K Railroad Materials,

Inc. dated July 14, 1989, the interest of A & K Railroad in Lot 4 Section 30 was purportedly conveyed to Michael J. Bartoletti, said deed recorded on Roll 114 Card 525.

11. Philip John Milanovich and his predecessors in interest have paid all real property taxes assessed and levied on the subject property, except that part of Lot 4 Section 30 which comprised the right-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which was assessed to and paid by said railroad.

12. According to the report from the Silver Bow County assessor's office Philip John Milanovich was assessed and paid taxes on all of Lot 4 Section 30 for the years 1986, 1987, 1988 and 1989 at which time the Silver Bow County Assessor removed 10.81 acres, formerly the railroad right-of-way, and determined it should be taxed to Michael Bartoletti based upon the quit claim deed to him from A & K Railroad.

13. Philip John Milanovich has attempted to pay all the taxes due on Lot 4 Section 30 since 1989.

14. Philip John Milanovich claims the right to use all of the roads which cross the Ernest Lode M.S. 8839 which lies within Lot 1 Section 29 and Lot 3 Section 30. There is no dispute concerning usage of the road as shown on Certificate #177-A as it enters Lot 3 Section 30 from Section 19 on the north then proceeds south across Lot 3 Section 30, across the Ernest Lode, and again across Lot 3 Section 30 before it exits Lot 3 Section 30 on its south boundary through the Bartoletti gate to Lot 6 Section 30. All parties recognize each other's right of use of that existing road as shown on Certificate of Survey #177-A.

15. The dispute Philip John Milanovich has with Defendant, Dan O'Neill, is over Plaintiff's use of the roads

on the Ernest Lode M.S. 8839 that have existed for many years which proceed off the existing road as shown on Certificate of Survey #177-A, one leading easterly then northerly to Lot 1 Section 29, and one leading southwesterly to Lot 3 Section 30.

16. Philip John Milanovich and his predecessors in interest owning Lot 1 Section 29 and Lot 3 Section 30 crossed the existing roads across the Ernest Mining Claim to access said Lot 1 Section 29 and Lot 3 Section 30 without permission or consent from the owners of the Earnest Lode Mining Claim, or anyone, openly, visibly, notoriously, continuously, adversely, exclusively under a claim of right and uninterrupted for a period of more than 50 years until after this action was filed and Dan O'Neill fenced the Ernest lode and put up gates in 1992.

CONCLUSIONS OF LAW

1. There is no dispute with regard to the boundaries of Lot 1 Section 29, Lot 3 Section 30, and Lot 4 Section 30 as located and established by the surveyor and as designated and described on Certificate of Survey #177-A filed with the Clerk and Recorder of Silver Bow County.

2. There is no dispute with regard to the ownership of Lot 1 Section 29 and Lot 3 Section 30. Philip John Milanovich owns the land in fee simple and is entitled to a decree quieting his title thereto as said lots are described on Certificate of Survey #177-A.

3. With regard to the ownership of Lot 4 Section 30 the ownership claim of Mike Bartoletti is based upon the quit claim deed from A & K Railroad Materials, Inc., which in turn is based upon the quit claim deed from Richard B. Ogilvie, Trustee in bankruptcy of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The claim of the railroad is based upon the grant pursuant

to Section 43 USC § 934, a Railroad Right of Way adopted in 1875 authorizing construction of railroads upon public lands.

4. The predecessor to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company was the Chicago, Milwaukee & St. Paul Railway Company of Montana which received certain parcels of land by deed from Michael J. Hennessy, Willie D. Hennessy, his wife, and Thomas Coughlin, an unmarried man dated September 27, 1906, recorded on Roll 78 Card 97 and dated October 10, 1908 recorded on Roll 87 Card 90. Michael J. Hennessy and Thomas Coughlin had located an unpatented mining claim known as South Star Lode filed for record July 23, 1901 in the quartz Lode registry p. 61.

5. At no time did Michael J. Hennessy, Willie D. Hennessy, and Thomas Coughlin receive a patent to the South Star Lode mining claim.

6. At no time did Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and its predecessors in interest, receive a patent to land it used for Railroad purposes in N1/2NE1/4 Section 30, known as Lot 4 Section 30.

7. The patent to Lot 4 Section 30 was issued to Joseph A. Gearing by the United States on March 14, 1917, thereby extinguishing all unpatented claims to said property, and Philip John Milanovich has succeeded to that interest.

8. When the railroad abandoned its right-of-way across Lot 4 Section 30, as provided by 43 USC § 1912 by virtue of the patent issued by the United States the abandoned right-of-way became part of the land owned in fee simple by Philip John Milanovich.

9. Philip John Milanovich paid the taxes assessed on the property for the years from the date of his ownership. That assessment by the Silver Bow County Assessor was changed from 79.17 acres to 99.13 acres when Certificate of Survey 177-A determined the proper acreage and then was cut back to 88.32 acres when the Appraisal Supervisor, Delores Redensek Cooney determined that the railroad right-of-way land in Lot 4 Section 30 was in fact 10.81 acres and was being taxed to both A & K Railroad Materials, Inc. and Philip John Milanovich.

10. As fee simple owner of Lot 4 Section 30 the entire 10.81 acres railroad right-of-way should be taxed to Philip John Milanovich.

11. All parties have the right free from objection, interference or limitation to use the road as shown on Certificate #177-A as it enters Lot 3 Section 30 from Section 19 on the north then proceeds south across Lot 3 Section 30, across the Ernest Lode, and again across Lot 3 Section 30 before it exits Lot 3 Section 30 on its south boundary through the Bartoletti gate to Lot 6 Section 30.

12. Philip John Milanovich has a right by prescription to travel those roads across the Ernest Lode M.S. 8839 which proceeds off the existing road as shown on Certificate of Survey #177-A, one leading easterly then northerly to Lot 1 Section 29, and one leading southwesterly to Lot 3 Section 30.

Let Judgment be entered accordingly.

Dated this 1st day of December, 1999.

Ted L. Mizan

District Court Judge, presiding

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 00-105

PHILIP JOHN MILANOVICH,

Plaintiff & Respondent,

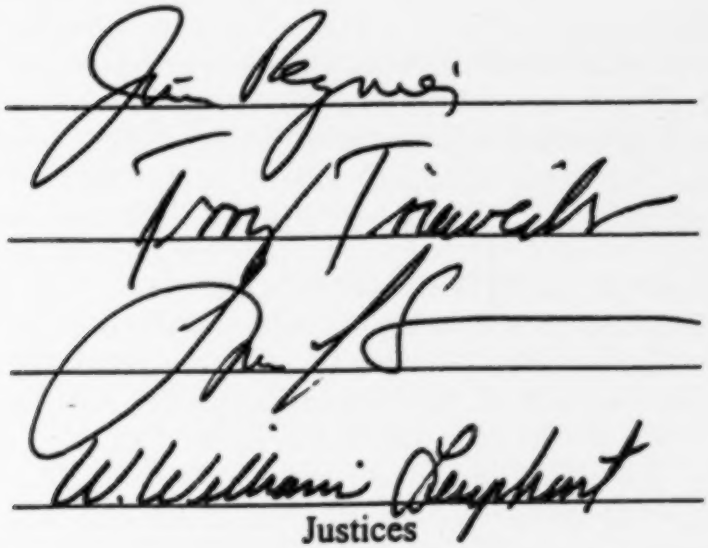
v.

STOJAN JANICICH and MARY JANICICH, NATALIE JANICICH MARUSICH, LOUISE JANICICH OBRADOVICH, DELORES JANICICH, LOUIS JANICICH, IGNATZ MILLINACH, BLAZO (or BOB) KILIBARDA, MICHAEL J. HENNESSY, WILLIE D. HENNESSY, THOMAS COUGHLIN; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, A & K RAILROAD MATERIALS, MIKE BARTOLETTI, DAN O'NEILL, and all other persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint adverse to plaintiff's title thereto, whether such claim or possible claim be present or contingent,

Defendants and Appellants.

IT IS HEREBY ORDERED that the petition for rehearing is DENIED.

DATED this 10th day of May, 2001.



Justices

UNITED STATES CONSTITUTIONAL ARTICLES

ARTICLE (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless son a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THIS INDENTURE, Made this 27th day of September A. D. 1906, between Michael J. Hennessy, Willie D. Hennessy, his wife, and Thomas Coughlin, (an unmarried man) parties of the first part, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF MONTANA, a corporation of the State of Montana, party of the second part,

WITNESSETH:

That the said parties of the first part, for anD in consideration of Three Hundred and Thirty-one and 50/100 ($331.50) Dollars, lawfull money of the United States of America, to them in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, its successors and assigns forever, all that certain strip, belt, or piece of land, lying and being in Silver Bow County, Montana, particularly described as follows, to wit:

A strip, belt, or piece of land, one hundred (100) feet wide, being fifty (50) feet of said width on each side of the center line of the railway of said party of the second part, as the same is now located, established, and staked out over and across the South Star Lode Mining Claim, which claim is situate in the north one-half (1/2) of the northeast one-fourth (1/4) of section thirty (30), Township two (2) North, Range seven (7) west, and is described in the Notice of Location thereof, bearing date the 30th day of April, 1901, and recorded in Volume "V" of Lode Locations, page 61, records of Silver Bow County, Montana, to which reference is hereby made.

And with the right to said party of the second part, its successors and assigns, to protect any cuts which may be made on said lands, by erecting on both sides thereof, and within one hundred and fifty feet from said

centerline, portable snow fences; provided, however, that such fences shall not be erected before the fifteenth day of October of each year, and shall be removed on or before the first day of April 01 the year next ensuing their erection. And said parties of the first part, for themselves and for their heirs and assigns, covenants and agree that said grant is upon no other consideration than that named herein that neither said party of the second part nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway or other privileges, over, across, or under said railway, and that the right thereto shall be only that conferred by statute or by an instrument in writing under the corporate seal of the party of the second part. and said party of the first part hereby releases all damages and claims thereto to all its other lands by reason of the location, construction and operation of a railway over and upon the premises hereby conveyed.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, saving and reserving, however, unto said parties of the first part, their heirs and assigns, all minerals whatsoever, including coal, iron, natural gas, and oil, with the right of entry upon said lands beneath the surface to explore, develop mine and remove such minerals; provided, however, that no such entry or work shall be made or carried on upon or from the surface of any land hereby conveyed, and that such entry and work shall at all times be made and carried on subject to the right of the party of the second part to surface support of the lands hereby conveyed, for railroad purposes and in such manner as shall not injure, endanger, or interfered with the construction, maintenance, use or operation of the railroad, or of any structures, appurtenances, or appliances constructed, maintained, or operated upon the lands hereby conveyed.

TO HAVE AND TO HOLD, all and singular, the said

premises, together with the appurtenances, unto the said second party and to its successors and assigns forever, except as aforesaid.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals, this 27th day of September, 1906

State of Montana,
County of Silver Bow

On this 27th day of September in the year 1906, before me a Notary Public in and for Silver Bow County, State of Montana, personally appeared Michael J. Hennessy, Willie D. Hennessy, his wife, and Thomas Coughlin (an unmarried man), known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

WITNESS my hand and official seal, this 27th day of September, 1906

H.C. Hopkins

(Notarial Seal) Notary Public in and for Silver Bow County, Montana.

Filed for record Sept. 27th, A.D. 1906, at 30 min. past 4 o'clock P.M.

P.J. Gilroy, County Recorder
by Wm. H. McNulty, Deputy.

BARGAIN AND SALE DEED.

THIS INDENTURE, made this 10th day of October A. D. 1908, between Michael J. Hennessy, Willie D. Hennessy, his wife, and Thomas Coughlin, an unmarried man, parties of the first part, and the Chicago, Milwaukee & St. Paul Railway Company of Montana, a corporation of the state of Montana, party of the second part, - WITNESSETH:-

That the said parties of the first part, for and in consideration of nine hundred and fifty-five and sixty-five hundredths dollars ($955.65), lawful money of the United States of America, to them in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, have granted, bargained, sold and ocnveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, its successors and assigns forever, all those certain pieces or parcels of land, lying and being in Silver Bow County, Montana, particularly described as follows, to-wit:-

Two strips or parcels of land, lying on either side of the right-of-way now owned by the Chicago, Milwaukee and St. Paul Railway Company, and described as follows:-

–1–

Beginning at a point on the north right-of-way line, said point being 50 feet from and at right angles to survey station 40-9 ÷ 86.5; thence on a regularly curved line to the left, whose radius is 905.37 feet, - said line being 50 feet from and parallel to the center line of the railway – a distance of 268.7 feet to a point; thence on a tapered curve to the left, said curve being 50 feet. from and parallel to the center line of the railway, for a distance of 175.25 feet to the point of beginning.

–2–

Beginning at a point on the south right-of-way line said point being 50 ft. from and at right angles to survey station 409÷86.5, a point on the center line of the railway; thence on a tapered curve to the right, said curve being 50 ft. from and parallel to the center line of the railway, for a distance of 184.75 ft. to a point; thence on a regularly curved line to the right, whose radius is 1005.37 ft., said curve being 50 ft. from and parallel to the center line of the railway – a distance of 298.6 ft. to a point, said point being 50 ft. from and on the radial line through survey station 414÷50; thence north 4^0 55' east, for a distance of 182.25 ft. to a point; thence north 38^0 30' east, for a distance of 105.00 ft. to the point of beginning.

The above described strips or parcels of land contain in all 0.61 acres.

Parcels of land, above described, being within the South Star Lode Claim, said claim being situate in the N. 1/2 of the N. E. 1/4 of Sec. 30., T. 2 N., R. 7 w., and is described in the Notice of Location thereof, bearing date, the 30th day of April, 1901, and recorded in Vol. "V" of Lode Locations, page 61, Records of Silver bow County, Montana.

– 3 –

Also, beginning at a point on the south right-of-way line, 50 ft. from and on the radial line through survey station 414÷ 50 a poiont on the center line of the Chicago, Milwaukee & St. Paul Railway; thence on a regularly curved line to the right, whose radius is 1005.37 ft. to a point, said point being 50 ft. from and on the radial line through survey station 417 ÷ 47; thence on a tapered curve to the right, 50 ft. from and parallel to the center line of the railway for a distance of 90.0 feet to a point, said point being on the west boundary of the South Star

Lode Claim, thence south 0° 9' east for a distance of 120 ft. to the Southwest corner of the South Star Lode Claim; thence South 85° 38'east for a distance of 561 feet to a point, said point being on the south boundary of the South Star Lode Claim; thence North 20° 59' west for a distance of 214.5 feet to a point, thence south 4° 55' west for a distance of 80.5 feet to the place of beginning.

Containing 1.9 acres more or less.

– 4 –

Beginning at a point on the north right-of-way line, said point being 50 ft from and at right angles to the center line of said reailway, opposite survey station 407 ÷ 991, being on the north boundary of the South Star Lode claim; thence South 51° 41' west a distance of 187.4 ft; thence south 68° 37' west a distance of 242.0 feet; thence south 38° 26' west a distance of 203.74 feet to a point, said point being 50 ft. from the center line of said railway, measured radially through survey station 414–50; thence on a regularly curved line to the right whose radius is 905.36 ft. and parallel to the center line of said railwlay a distance of 281.3 ft. to a point, said point being 50 ft. from the center line of said railway and measured radially through survey station 417 ÷ 47; thence on a tapered curve to the right parallel to the center line of said railway a distance of 99.5 ft. to a point, said point being on the west boundary of the South Star Lode Claim; thence north 0° 9' west a distance of 483.1 ft. to a point, said point being the north-west corner of the South Star Lode Claim; thence south 85° 17' east long the north boundary of said Lode claim a distanct of 919.1 ft. to the place of beginning.

Containing 5.8 acres more or less.

The above described strips or parcels of land are within the South Star Lode claim, said claim being situated in

the north 1/2 of the N. E. 1/4 of Sec. 30, T. 2 N. R. 7 W., Silver Bow County, Montana.

And with the right to said party of the second part, its successors and assigns, to protect any cuts which may be made on said lands, by erecting, on both sides thereof and within one hundred and fifty feet from said center line, portable snow fences; provided, however, that such fences shall not be erected before the fifteenth day of October of each year, and shall be removed on or before the first day of April of the year next ensuing their erection. And said parties of the first part, for themselves and for their heirs and assigns, covenant and agree that said grant is upon no other consideration than that named herein; that neither said party of the second part nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege, over, across or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the corporate seal of the party of the second part. And said party of the first part hereby releases all damages and claims thereto to all its other lands by reason of the location, construction and operation of a railway over and upon the premises hereby conveyed.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining; saving and reserving, however, unto said parties of the first part, their heirs and assigns, all minerals whatsoever, including coal, iron, natural gas, and oil, with the right of entry upon said lands beneath the surface to explore, develop, mine and remove such minerals: provided, however, that no such entry or work shall be made and carried on subject to the right of the party of the second part to surface support of the lands hereby conveyed, for railroad purposes, and in such manner as shall not injure, endanger, or interfere with the construction, maintenance, use or operation of

the railroad, or of any structures, appurtenances, or appliances constructed, maintained, or operated upon the lands hereby conveyed; and provided further, that the foregoing mineral reservation shall in no event be construed to abridge or limit the right or said party of the second part, its successors or assigns, to excavate and carry away from the premises herein conveyed any and all earth, rock gravel or other materials it or they may desire for use on or along the railway lines of the Chicago, Milwaukee and St. Paul Railway Company of Montana.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances, unto the said second party, and to its successors and assigns FOREVER, except as aforesaid.

IN WITNESS WHEREOF, The parties of the first part have hereunto set their hands and seals, this the 10th day of October, 1908.

Signed, sealed and delivered in the presence of
Charls B. Ruggle

Michael J. Hennessy
Mrs. Willie D. Hennessy
Thomas Coughlin

STATE OF MONTANA,

County of Silver Bow. – ss

On this 10th day of October in the year 1908 before me H. C. HOPKINS, a Notary Public in and for Silver Bow County, State of Montana, personally appeared Michael J. Hennessy, Willie D. Hennessy, his wife, and Thomas Coughlin, (an unmarried man), known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

WITNESS my hand and official seal, this 10th day of October, 1908.

(Notarial Seal) H. C. HOPKINS

Notary Public in and for Silver Bow County, Montana.

Filed for Record October 12th A. D. 1908, at 35 min. past 12 o'clock P. M.

Geo H. Scott, County Recorder

By W. E. Ralph, Deputy

The United States of America,
To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Helena, Montana, has been deposited in the General Land Office, whereby it appears that, payment to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Joseph A. Gearing has been established and duly consummated, in conformity to law, for the Lots one, two, four, nine, and ten, the east half of the northwest quarter, and the northeast quarter of the southwest quarter of Section thirty in Township two north of Range seven west of the Montana Meridian, Montana, containing three hundred ten and eight-one-hundredths acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described: TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever: subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patient, and the seal of the General Land Office to be hereunto affixed.

GIVEN under by hand, at the City of Washington, the fourteenth day of March, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-first.

By the President:

Woodrow Wilson

By M. P. Le Roy Secretary.

L. L. C. Lamar

Recorder of the General Land Office.

RECORDS OF PATENTS: Patent Number: 572296

As custodian of the public records required by the Bureau of Land Managment, Billings, Montana, I hereby certify Rt. to be a true copy.

Date 11 Sept 1996

Signature Sally Crafton

QUITCLAIM DEED

WHEREAS, the Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, issued a Quitclaim Deed dated October 24, 1983 of certain real property in Silver Bow county, recorded at Roll 61 Micro, Card 241 in Silver Bow County Recorder's Office.

WHEREAS, A & K RAILROAD MATERIALS, INC. AND MICHAEL J. BARTOLETTI have reached an understanding pursuant to which A & K RAILROAD MATEREIALS, INC. is to quitclaim the lands described below to MICHAEL J. BARTOLETTI,

KNOW ALL MEN BY THESE PRESENTS, that for an in consideration of the sum of $1.00, the receipt and sufficiency of which is hereby acknowledged, Grantor A & K RAILROAD MATERIALS, INC. of 1505 South Redwood Road, P. O. Box 30076, Salt Lake City, Utah A4130, does hereby remise, release, relinquish and forever quitclaim to MICHAEL J. BARTOLETTI, all of the Grantor's right, title and interest in and to all of the lands formerly occupied and used by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company as portions of a railroad right-of-way traversing over and across the following described lands in Silver Bow County, Montana, to wit:

TOWNSHIP TWO NORTH (T2N), RANGE SEVEN WEST (R7W), M.P.M.

SECTION 30, N 1/2 WE 1/4

SECTION 19, S 1/2 SE 1/4

To have and to hold said above-described lands unto the Grantees, their heirs and assigns forever.

DATED THIS 14 DAY OF JULY, 1909.

A & K RAILROAD MATERIALS, INC.

BY _____

Morris H. Kulmer, President

STATE OF UTAH

COUNTY OF SALT LAKE

SS.

The foregoing instrument was acknwledged before me, this 14 day of july, 1909, by Morris H. Kulmer, President, of A & K Railroad Materials, Inc.

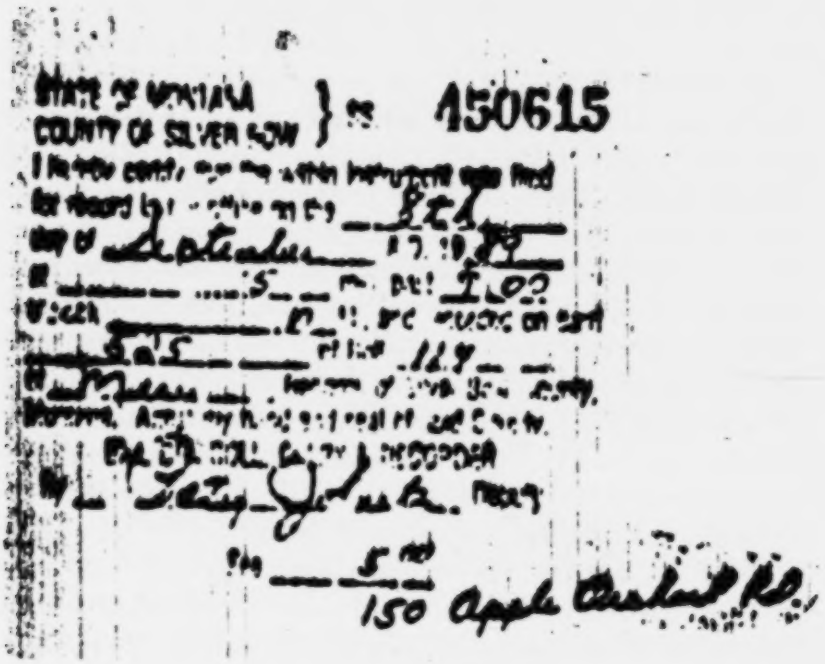
_____

NOTARY PUBLIC

Residing at: _____

My Commission Expires: 1/10/11

BEST AVA



STATE OF MONTANA } ss. 450615
COUNTY OF SILVER BOW }

I hereby certify that the within instrument was filed
for record [illegible] day
day of [illegible] 19[illegible]
at [illegible] o'clock [illegible] M. and duly
recorded in book [illegible]
of [illegible] page [illegible]
Records of said County.

Fee $ [illegible]

By [illegible] Deputy

Req $ 5.00
150 Apple Creek Rd.

LABLE COPY

CORRECTION QUITCLAIM DEED

RICHARD B. OGILVIE, not as an individual but solely as Trustee of the property of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor (GRANTOR), being in possession of all the assets and property of said Railroad Company under authority of the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 77 B 8999 in proceedings under Section 77 of the Bankruptcy Act and pursuant to Order No. 622 of said Court entered October 25, 1982, for an in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, does hereby CONVEY and QUITCLAIM, free from the liens of said Railroad Company's First Mortgage and General Mortgage, each dated as of January 1, 1944, and all mortgages supplementary thereto, and from all other liens and claims as provided in said Order No. 622, unto A&K RAILROAD MATEREIALS, INC., P. O. Box 30076, Salt Lake City, Utah, 84130 (GRANTEE), subject to any and all exceptions and reservations hereinafter set forth, the following described real estate, to-wit:

All of GRANTOR'S right, title and interest is and to approximately 292 acros of land, consisting of right-of-way, extra width, station ground and yard properties, in, on, over and across the following described real estate in Silver Bow county, Montana, to-wit:

Township 1 North, Range 6 West:
Section 26 - SE 1/4, SW 1/4
Section 17 - SE 1/4, SW 1/4
Section 19 - NE 1/4
Section 18 - SE 1/4, SW 1/4

Township 1 North, Range 7 West:
Section 13 - SE 1/4, NE 1/4, NW 1/4
Section 14 - NE 1/4
Section 11 - SE 1/4, NE 1/4, NW 1/4
Section 2 - SW 1/4
Section 3 - SE 1/4, SW 1/4, NW 1/4

Township 2 North, Range 7 West:
Section 34 - SW 1/4
Section 33 - SE 1/4, NE 1/4
Section 28 - SE 1/4, SE 1/4, W 1/4, SE 1/4, NE 1/4, S 1/4, SE 1/4, NW 1/4, S 1/4, NE 1/4, SW 1/4, NW 1/4, S 1/4, NW 1/4, SE 1/4, NW 1/4
Section 19 - S 1/4,, SE 1/4, N 1/4, NW 1/4
Section 20 - S 1/4, NW 1/4, W 1/2, SW 1/4
Section 30 - N 1/2, NE 1/4, N 1/2, NW 1/4
Section 18 - E 1/2, SW 1/2, NW 1/4, lying south of a line drawn perpendicular to track at a point distance 170 feet south of north line of NW, SE 1/4

Township 2 North, Range F West:
Section 25 - NE 1/4, NE 1/4
Section 24 - SE 1/4, E 1/2, NE 1/4

Together with all facilities and improvements located thereon EXCEPTING:

Automatic crossing signals at N.P. 1514.2 which said signals are the property of the State of Montana and will be recovered by the State.

this conveyance is subjet to: Easement to Montana Power Company, dated July 15, 1974, for the operation, maintenance, repair and renewal of a 100 KVA electric transmission line; to all exceptions, reservations, conditions and restrictions of record; to all existing leases, easements, licenses and rights of the public, whether or not of record: to all general real estate for the tax year 1983 and subsequent years; and to all special assessments, if any, levied subsequent to September 1, 1982.

Meaning and intending hereeby to correct the legal description as contained in that certain quitclaim deed of October 24, 1983, by and between the parties hereto recorded in the office of the Recordere of Deds, Silver Bow County, Montana, on December 15, 1983, on Card 241 of roll 61 of micro as Document Number 403107.

IN WITNESS WHEREOF, this instrument is executed by RICHARD B. OGILVIE this July 2, 1994.

RICHARD B. OGILVIE, not as an individual but solely as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor

WITNESS:

For said Trustee

R.H. KEEGAN

F.E.I.N. 36-6000639

This document was prepared on behalf of RICHARD B. OGILVIE, not as an individual but solely as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, by R. H. Keegan, Real Estate Attorney, Property Management Department, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, Chiicago, Illinois.

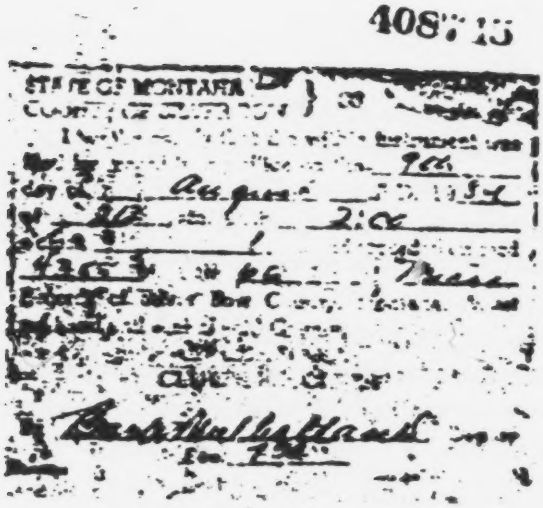
STATE OF ILLINOIS

COUNTY OF COOK

On this July 2, 1984, before me, the undersigned, a Notary Public in and for said County and Seats, personally appeared RICHARD B. OGILVIE, to me known to be other identical person named in and who executed the foregoing instrument, and acknowledged that he executed the same as his voluntary set and deed as Trustee aforesaid.

Notary Public

RAYMOND H. KEGAN
Notary Public, Cooke County, IL.
My Commission Expires Nov. 30, 1987



Chicago, Milwakee, St. Paul
and Pacific Railroad Company
Room 288 Union Station
516 West Jackson Boulevard
Chicago, Illinois 60606
Phone 312/648-3000

March 12, 1981
Refer to: 76187

Mrs. E. A. Bartoletti
3500 Wilson Avenue
Butte, Montana 59701

Dear Mrs. Bartoletti:

Please refer to your note to Mr. D. A. Radabaugh, concerning Railroad property near Janney, Montana which you occupy under Lease 76187.

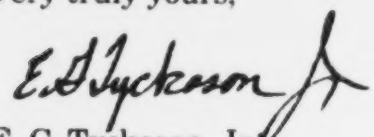
The property which you lease is a portion of property acquired from M. Hennessey et al by a deed dated October 10, 1908. The deed was filed for record in Silver Bow County on October 12, 1908 in Book 87 on Page 90. You can obtain a copy of the deed at the County Court House.

Portions of the Railroad Company's property in the Janney area were acquired by Grant & Filing Map from the United States Government Department of Interior. These grants were filed with the Department of Interior in Washington and their field office for the territory involved but are not filed in the individual Counties.

I am curious as to how Mr. Milanovich and/or his surveyor are claiming title to any portion of the Railroad Company's property. As of this date we have not received

any correspondence from Mr. Milanovich or a copy of the survey that you referred to.

Very truly yours,



E. G. Tyckoson, Jr.
General Mgr. - P{roperty Mgt.
312/648-3177

EGT/bp/4/8588

July 24, 1970

File: L-76187 - Mont. - Manney
Dr. E. A. Bartoletti

Dr. E. A. Bartoletti
3500 Wilson Avenue
Butte, Montana 59701

Dear Dr. Bartoletti:

Reference your request to lease Railroad Company land near Janney, Montana, for pasture purposes.

Attached are duplicate originals or proposed lease No. 76187 prepared to cover your use of approximately 5.8 acres of the Railroad Company's land for pasture. The lease has been made effective June 1, 1970, for the term of one year and thereafter until cancelled on 60 days' notice. It provides for rental at the rate of $80.00 per annum payable annually in advance plus taxes. As the Lessee, you are also required at your own sole cost and expense to construct, maintain and repair a fence to

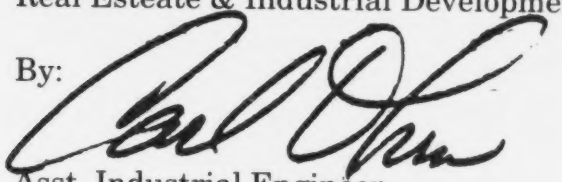
prevent livestock from entering the Railroad Company's track zone.

Would you please sign both copies in the space provided, have your signature witnessed and return both copies to me. After execution on behalf of the Milwaukee, a fully executed copy will be returned to you.

Thank you.

Sincerely yours,

PAUL W. SCOTT, Western Director
Real Esteate & Industrial Development

By: 

Asst. Industrial Engineer

LEASE NO. 76187

(Rev. of No. New)

This Indenture

Made this 22nd day of July, A.D. 1970, by and between the CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, hereinafter called "Railroad Company," and DR. E. A. BARTOLETTI of 3500 Wilson Avenue, Butte, Montana 59701, hereinafter called "Lessee,"

WITNESSETH:

FIRST: The Railroad Company does hereby lease, demise and let unto the Lessee, the following piece ... or parcel of land lying within and being a portion of its property, at the Station of Janney, County of Silver Bow, State of Montana and described as follows, to-wit:

That portion of the Railroad Company's land in the NW1/4 NE 1/4, Section 30, T. 2 N., R. 7 W., M.P.M., Silver Bow County, Montana containing a total of approximately 5.8 acres, and being more particularly shown outlined red on the print dated July 212, 1970, attached hereto and made a part hereof.

TO HOLD for the term of ONE year from the 15th day of June, 1970, and thereafter until sixty days after either party shall have given to the other written notice of its desire to terminate this Indenture; but subject always to the following express conditions, viz:

1. That the Lessee shall pay as rent for said demised premises the sum of EIGHTY AND NO/100 ($80.00) Dollars per annum payable annually in advance, together with all taxes and assessments (except special assessments for permanent improvements) legally levied or assessed against said premises for the term hereof or

of any extension thereof; and in case of special assessments for permanent improvements, the annual rental will be increased by 8% of such assessment;

2. That the Lessee shall use said premises as a site for pasture and for no other purpose whatsoever, unless the Railroad Company shall consent in writing to a change of user, and that he will not, without like consent, assign this lease or under-lease said premises or any part thereof;

3. That the Lessee shall continuously carry on his business upon said premises in an efficient manner, unless discontinued by written consent of the railroad Company; that said premises shall be used and the business thereon conducted, in so far as it may affect the interests or operations of the Railroad Company, to the approval of its General Manager; and that he will not in any way obstruct or interfere with the tracks of the Railroad Company;

4. That the property herein demised is leased in its condition at the date hereof; that any and all facilities, including overhead or underground fixtures, located thereon shall be maintained and operated as heretofore;

5. That the Lessee shall erect upon said site the building or buildings appropriate for the uses herein mentioned, and have the name completed and ready for use within three months from the date of this lease; and that all doors in such building or buildings shall be so constructed as to open inward or be of a sliding type;

6. The Lessee agrees to keep said premises and all buildings thereon in a neat and orderly condition, and to cover all buildings with one or more coats of approved paint, whenever required so to do by the Railroad Company, of such color as the Railroad Company may direct, and that no signs nor advertisements of any

description shall be permitted to be painted or posted upon said buildings, or about said premises, other than those of the business of the Lessee, and as shall be approved by the Railroad Company.

7. It is understood that the movement of railroad locomotives includes some risk of fire, and the Lessee assumes all liability for and agrees to indemnify the Railroad Company against loss or damage to property of the Lessee, or to property upon the Lessees premises, regardless of railroad negligence, arising from fire caused by locomotives operated by the Railroad Company in the vicinity of said demised premises, except to the premises of the Railroad Company, and to rolling stock belonging to the Railroad Company or to others, and to shipments in the course of transportation;

8. That the Lessee hereby releases the Railroad Company from and agrees to indemnify it against all loss, damage or injury, caused by or resulting from any act or omission of the Lessee, his employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said demised premises, and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

9. That in any case where the covenants, agreements and releases contained in the two preceding paragraphs shall be held not to be valid in law, the Railroad Company shall have the full benefit of any insurance, effected by the Lessee upon the property injured or destroyed.

9a. Nothing herein contained shall affect the right of either party to terminate this lease on written notice as herein provided, and in the event of such termination, any unearned rental shall be refunded.

9b. That the Lessee shall at his own sole cost and expense, construct, maintain, and repair a fence about the premises herein demised to effectually prevent livestock from encroaching upon the track zone of said property, said fence to meet the requirements of the Railroad Company's Division Superintendent.

9c. Regardless of the term herein specified, it is mutually understood and agreed that, unless sooner terminated in accordance with the provisions thereof, this lease shall expire June 14, 1975.

10. That the right or interest created by this instrument shall be subject and subordinate to the continuing lien of the First Mortgage dated as of January 1, 1944, executed and delivereed by Chicago, Milwaukee, St. Paul and Pacific Railroad Company to Continental Illinois National Bank and Trust Company of Chicago, Trustee, and to the lien of the General Mortgage dated as of January 1, 1944, executed and delivered by Chicago, Milwaukee, St. Paul and Pacific Railroad Company to Harris Trust and Savings Bank, Trustee.

11. That any violation or failure to comply with any foregoing condition shall terminate this lease without any notice or act upon the part of the Railroad Company, and thereupon it may re-enter and take possession of said premises, as by law provided;

SECOND: The Lessee hereby accepts the foregoing lease, and convenants and agrees faithfully to observe and perform all the terms, conditions and requirements therein contained, and he further agrees that he will surrender said demised premises at any termination of this lease, and will, on or before the effective date of such termination, completely remove from said premises all property owned or placed therein by him, and will restore the premises to a state of usefulness for general purposes; that failure so to remove all such property shall be

conclusively deemed an abandonment thereof to said Railroad Company, thereby waiving all his right, title and interest in and to such abandoned property; and that in such case the Railroad Company shall, from and after the effective date of any such termination, be at full liberty to re-enter and take possession of all the demised premises and, at the sole expense of the Lessee, to remove therefrom all such property there remaining and to restore the premises to a state of usefulness for general purposes, and the Lessee hereby binds himself to pay unto the Railroad Company promptly upon receipt of bill therefor, the entire cost and expense of such removal and resoration; or, at its own sole option, to appropriate and dispose of any such property without any liability or accountability whatever therefore; but nothing herein contained shall preclue the Railroad Company from any other legal remedy.

All the terms, conditions and covenants of this lease, shall, during its continuance be binding upon the Railroad Company, its successors and assigns, and upon the Lessee and his successors and assigns, heirs, and legal representatives.

IN WITNESS WHEREOF, The parties hereto have caused these presents to be duly executed the day and year first above written.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

_____

Witness For Railroad Co.

_____

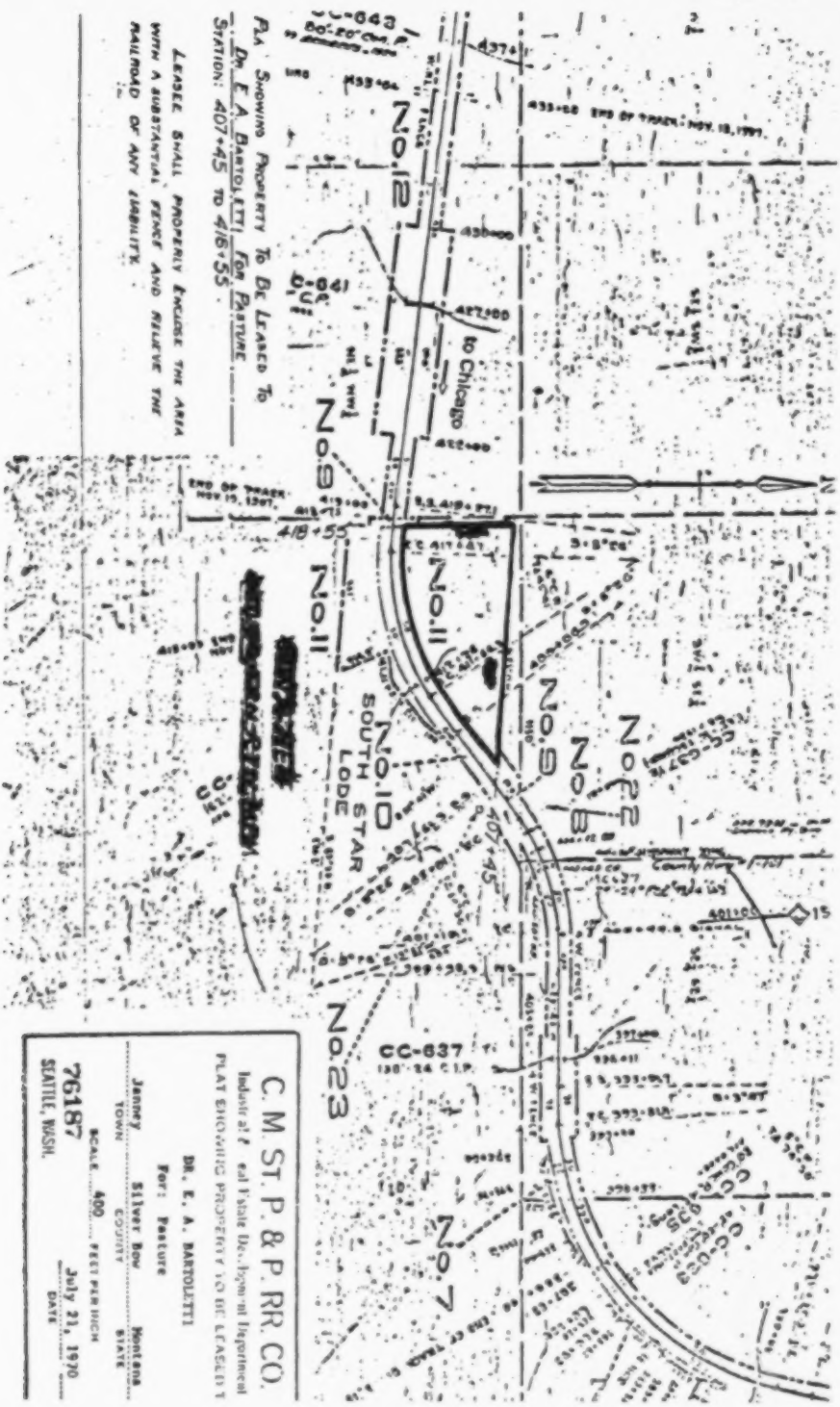
Witness For Lessee

By_____

Vice President – Real Estate and Industrial Development

_____

Lessee



PLAT SHOWING PROPERTY TO BE LEASED TO
Dr. E. A. BARTOLETTI FOR PASTURE
STATION: 407+45 TO 418+55.

LESSEE SHALL PROPERLY ENCLOSE THE AREA WITH A SUBSTANTIAL FENCE AND RELIEVE THE RAILROAD OF ANY LIABILITY.

LEASE No. 76187

CHICAGO, MILWAUKEE, ST. PAUL
AND
PACIFIC RAILROAD COMPANY

TO

.....

.....

.....

LEASE

Expires on 60 days' notice after.....

.....

Rental.....

Payable.....

Taxes.....

Use.....

.....

Noted .....Auditor Exp.

Account No. 510

DEPARTMENT OF REVENUE
SILVER BOW COUNTY APPRAISAL OFFICE

October 5, 1989

Dr. John Milanovich
3100 Harrison
Butte, MT 59701

Re: Ownership of Sec. 30-2N-7W (Government Lots 3, and 4)

Research done on the above legal description has shown that both you and A & K Railroad are being assessed for this property.

Further research of the deeds filed in the Clerk and Recorder's Office showed that the land was sold to Chicago, Milwaukee, St. Paul Railroad, deed references – Book 87/Page 90, Book 78/Page 97, Book 78/Page 54. Ownership was then transferred to A & K Railroad by deed references – Roll 61/Card 241, Roll 66/Card 435, Roll 87 Card 150.

Your 1989 assessment will be changed to reflect 10.81 acres less, from 99.13 acres to 88.32 acres.

If you have any question please feel free to contact me.

Sincerely,

Dolores Redensek Cooney
Appraisal Supeervisor

DEPARTMENT OF REVENUE
SILVER BOW COUNTY APPRAISAL OFFICE

June 8, 1990

Mr. Michael Bartoletti
150 Apple Orchard Road
Butte, MT 59701

RE: Ownership in Sections 19 and 30 Township 2 North Range 7 West

Dear Mr. Bartoletti;

For tax year 1990 you are assessed for that parcel known as "The railroad right of way across the S2SE4 of sections 19 and 30 township 2 North Range 7 West". This parcel was purchase by yourself from A & K Railroad, and is recorded in the Butte-Silver Bow Clerk and Recorder's Office on Roll 114/ Card 525.

In previous tax years this parcel was double assessed to A & K Railroad and John K., Jennifer, and Stanna Milanovich. Research performed by our office has revealed that the land should have been assessed to A & K Railroad alone. We have notified the other party of this error. Attached is correspondence from and to this office regarding this matter.

If I may be of further assistance please do not hesitate to contact me.

Sincerely,

Delores Redensek Cooney
Appraisal Supervisor

TRIAL TRANSCRIPT EXCERPTS

DIRECT EXAMINATION

BY MR. HATCH:

Q. Would you please state your name for the record?

A. Maurice Maffei.

Q. What is your business or profession, Mr. Maffei?

A. I'm an attorney.

Q. And how long have you practiced law?

A. Forty-seven years.

.....

Q. Now I notice also through Lot 4 is a notation by the surveyor that the railroad had a right of way or at least went through lot no. 4?

A. That is correct.

Q. What railroad is that?

A. That was the Chicago, Milwaukee, St. Paul and Pacific.

Q. Did you find any patents to the railroad?

A. None whatsoever.

Q. Could you tell us, then, how the railroad happened to have a railroad in that part of the section?

VOIR DIRE EXAMINATION

BY MR. BROWN:

Q. By that part of the section, what part did you understand that question to refer to?

A. In the northwest corner of Lot 4. It's the railroad that's depicted on the survey.

Q. Which corner?

A. It's the northwest corner of Lot 4. It's shown on the survey.

MR. HATCH: I'm not picking here, but I think it's the – this is 30, okay.

MR. BROWN: I'm sorry.

Q. (By Mr. Brown) So the 1875 – with respect to the – what was the section you mentioned, the US code?

A. 33-934.

Q. 934, and that is part of a number of code sections that have to do with the Act of 1875; is that correct?

A. Well, that code section is called the Railway Right-of-Way Act of 1875.

Q. And the entire code, right?

A. Right.

Q. Did I understand you to say that the right-of-way over Lot 4 that's claimed by the Milwaukee Railroad, they obtained that as a result of the Act of 1875?

A. To the best of my knowledge, they did, because there was no grant to the railroad.

Q. What facts do you have, or what did you discover that led you to that conclusion?

A. The railroad is there.

Q. Did you, in your investigation, discover whether or not the railroad had filed a profile of its road with the Department at that time in 1908 or so?

A. No, I didn't check with the Department of the Interior.

Q. Did you further check to find out if there was such a profile filed that it had been completed within five years?

A. No, I didn't.

Q. And did you also check to find out whether, in fact, the railroad had filed its Articles of Incorporation with the – I'll say Bureau of Land Management, whatever bureau it was, in 1908?

A. Well, it would not have been the Bureau of Land Managment, no.

MR. BROWN: At this time, I'll object to any testimony on the part of the witness to the effect that the right-of-way claimed by the Chicago and Milwaukee came to it pursuant to the 1875 law which is popularly known as the general Railroad Right-of-Way Act.

THE COURT: The record will reflect your objection.

Whereupon,

ELLEN CRAIN,

was first duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Good morning.

A. Morning.

Q. Would you state your name, please?

A. My name is Ellen Crain.

Q. Would you be more comfortable – where do you reside, Ms. Crain?

A. In Butte, Montana.

Q. And you are employed?

A. I'm employed by Butte-Silver Bow Public Archives; Butte-Silver Bow government.

Q. What is your position in such employment?

A. I'm the Director of Archives.

Q. As Director of Archives, briefly, what are your duties?

A. I'm the records manager for Butte-Silver Bow, and I archive all pertinent documents pertaining to the history of Butte-Silver Bow. We do research from those

documents for individuals, groups, organizations.

Q. With respect to tax bills and tax assessments, are any of those contained in your archives?

A. Yes, they are. All non-current government records are usually stored at the archives until such a period that either state law allows us to destroy them or we feel that they no longer serve our purpose. So we have tax records for selected years stored in our archives.

Q. Directing your attention to a communication on the first two pages of Exhibit 4, Plaintiff's Exhibit 4, would you look at those, please?

A. Okay.

Q. Do you recognize that?

A. Yes. This is a correspondence that I sent to Mr. Carl Hatch in November of 1996.

Q. In response to his questions, and prior to this communication that you issued, what did you do in that regard?

A. Well, my records indicated that Mr. Hatch called us, and we took the legal description went into the tax assessment books in the basement of the Archives and did the research on this parcel of land.

Q. And you did it for the years 1981 through 1978; is that correct?

A. That's correct.

Q. How far back do the records in the Archives go with regard to this piece of property; do you know?

A. Well, I have the tax assessment books from 1970 to about 1981. I also have a series of from 1880 to 1900. The – so the tax books that we looked at were the 1978 to '81, for this correspondence.

Q. Some time ago, did I accompany you when you showed me these very same tax records dating back to 1970?

A. Yes.

Q. And did we examine each of them, as far as you can recall?

A. Yes.

Q. Tell me this, was there additional language on those tax assessments that do not appear – that does not appear in your letter to Mr. Hatch?

A. Yes.

Q. And specifically with regard to Lot 4, as he asked you and the assessment there, was there any other additional language that would be pertinent to our case here today?

A. Well, I believe so. If we pointed out the exception of the – and it's not on here, but I have a little note here, "All of Lot 4, excluding 11.5 acres of R/W."

Q. And on how many of the assessment records in your archives that you looked at did that language appear?

A. All of them.

MR. BROWN: You may examine.

CROSS-EXAMINATION

BY MR. HATCH:

Q. Mrs. Crain, even though the letter that you addressed to me in November of 1996 specified Lot No. 4, this particular tax ID number also included all of the Milanovich acres up there, Lot 1 and Lot 3, also; did they not?

A. Yes, they did.

Q. So comparing what you saw on the records of 1970 on, with what we have here in '82 through '90, it's exactly the same description, pretty much?

Q. Well, I would assume, yes.

Q. The same language?

A. The same language..

Q. Of course, each of those says, "All Lot 4"?

A. Right.

Q. And then there's a comma?

A. Uh-huh.

Q. There's also a comma between Lot 3 and then, "All Lot 4"?

A. I believe so. I would have to grab that book to answer that exactly, but I would assume.

Q. Do you know of any other rights-of-way that may be in that area in the Milanovich property?

A. I would have no idea.

MR. HATCH: No other questions.

REDIRECT EXAMINATION

BY MR. BROWN:

Q. I'm not sure I heard; but just to make everything clear, you've testified that all of the records you examined, in addition to Lot 4, added the language of, "All Lot 4 except 11.5 AC R/W;" is that right?

A. Absolutely.

MR. BROWN: I have no further questions.

THE COURT: You may step down.

MR. BROWN: May this witness be excused, Your Honor?

MR. HATCH: No other questions of the witness.

THE COURT: You may be excused.

MR. BROWN: Thanks. We would call Dolores Cooney.

Whereupon,

DOLORES COONEY,

was first duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Please state your name, please?

A. Dolores Redensek Cooney.

Q. Where do you reside, Ms. Cooney?

A. 2718 Edwards in butte.

Q. Are you employed?

A. Yes, I am, by the State of Montana.

Q. And what is your position with the State of Montana?

A. My current position is a Division Administrator with the Department of Revenue.

Q. What does that encompass?

A. It encompasses the valuation and compliance for all tax types, property, corporate, income, et cetera.

Q. And over what geographic area of Montana are you talking about?

A. Currently, we're talking about the southernmost part of the state and the easternmost part of the state.

Q. For how long have you had a position as Regional Manager for the Department of Revenue?

A. Regional Manager – I had been Regional Manager for Region 6, which is the Butte area, up until May of this year.

Q. And in May of this year, then, you were promoted; is that correct?

A. Uh-huh.

Q. And as Regional Manager – how long have you been such?

A. I had been a Regional Manager for approximately two years.

Q. What was your position prior to being Regional Manager?

I was the Appraisal Supervisor for Butte-Silver Bow since 1981.

Q. And prior to that, what was your occupation?

A. Prior to that, I had been with the Department of Revenue as an appraiser, commercial appraiser, and also as a supervisor for a mass appraisal effort.

Q. Your background in property assessment appraisal with the State of Montana goes back to what date?

A. 1976.

Q. What studies or education or training have you had in conjunction with your activities in this field?

A. Extensive amount of training in the assessment and valuation of real and personal property, cadastral mapping. I currently hold a license as a General Certified Appraiser for the State of Montana, and I also have a professional designation from the International Association of Assessing Officers.

Q. Do you have a staff that you supervise?

Q. I have a staff today I supervise, and a staff I supervised as a Regional Manager for the Department.

Q. As Regional Manager, how many persons are in there?

A. Approximately 27.

Q. I see. And this was – when you were here in Silver Bow County and were acquainted with the issues involved in this particular case; is that right?

A. Yes.

Q. Mrs. Cooney, I'm going to show you a collection of papers that have loosely been described as Defendant's Exhibit H for identification. And I'll ask you if you'll look at that, please? What does that exhibit purport to be?

A. It contains records from the Butte-Silver Bow appraisal Assessment Office regarding the property under discussion today, tax bills and correspondence.

Q. What is the first entry in the exhibit that I just handed you; would you tell us what that is?

A. It's a property record for agricultural property. It's in the appraisal section. I believe it's –

THE COURT: Have you had this offered into evidence, counsel?

MR. BROWN: I beg your pardon?

THE COURT: Do you wish to have this offered into evidence?

MR. BROWN: Yes, I do. I'll offer Exhibit H in evidence as – for identification, as Defendant's Exhibit H, Your Honor.

MR. HATCH: We have no objection. I think there's a stipulation that it should go in.

THE COURT: The same will be admitted then as Defendant's Exhibit H.

Q. (By Mr. Brown) To make sure we're on the same page, may I see what is your – okay, this has been reduced. The first page of the exhibit, would you tell us what that represents?

A. It's the property record for that property described on the document. It's the history of changes, who appraised it, et cetera.

Q. It purports to show Milanovich, John K, Jennifer and Stana. Are those the current owners as far as you're aware?

A. They were the owners of record as far as this.

Q. At this time. And that has to do with what pieces of property in Silver Bow County?

A. Government Lot 1 in Section 29, Township 2 North, Range 7 West, and Government Lot 3 and 4 in Section 30, Township 2 North, Range 7 West.

Q. I notice that under the heading of grazing, there is a line drawn through, "Acres, 99.13, and value 369;" is that right?

A. Yes.

Q. Below that is 8832 and 329; what does that mean?

A. A change had been made in the acreage from the 99.13 to 88.32 acres.

Q. And what was the date of that change?

A. It appears to be in 1989, October of '89, according to the comment on the bottom.

Q. Did this represent a change from a previous period?

A. It did.

Q. The second pae of this exhibit, what period of time does that purport to address?

A. 1986 to 1989.

Q. Now, at 1986, what was done with respect to the acreage on Lot 4?

A. The acreage had been corrected, according to Certificate of Survey 177A, to 99.13 acres. In 1989, it was discovered there was an error, and the acreage was taken from 99.13 down to 88.32.

Q. Now – and why was the change made in 1986?

A. A Certificate of Survey was filed. The drafter recorded the Certificate of Survey into the cadastral map at that point.

Q. What was the survey that was filed?

A. It was a survey 177A in regard to the property under the description.

Q. Would that be the survey that's represented here on the easel as Plaintiff's Exhibit 1?

A. It is.

Q. Tell me, what is the usual procedure in the assessment office when a Certificate of Survey is formally filed with the Clerk and Recorder/

A. It's at that point taken from the Clerk and Recorder by the cadastral drafter and recorded on the cadastral plats in the Appra;isal Assessor's Office, once they're corroborated by deed.

Q. And by cadastral recorder, what do you mean?

A. Cadastral mapping is ownership mapping. The assessment roll itself is the cadastral.

Q. I guess I had things backwards. Page 2 is the first one, and then page 1 was the following effort in your office; is that right?

A. Right.

Q. So that if I'm correct, from the period of November of '86 til sometime in 1989, there was an increase in the acreage shown as owned by the Milanoviches; is that right?

A. Yes.

Q. And were they assessed for that increased acreage during that period of time?

A. During that time period.

Q. And did that result in an increase in their taxes at that period of time?

A. It resulted in an increase in their valuation, which could correlate to an increase in taxes.

Q. As another portion of the exhibit, what do you see next, Mrs. Cooney?

Q. Tax bill from the Butte-Silver Bow Treasurer's Office.

Q. And for what years are they in that exhibit?

A. 1982 to 1984.

Q. Is that for each of the years from '82 through 1984 – or 1994, sorry?

A. Yes, they are.

Q. And to whom are these bills made?

A. They are all to John, Jennifer and Stana Milanovich.

MR. HATCH: All the bills, or just the ones that were –

MR. BROWN: I think the question was, all of the bills were addressed to what ownership; is that right?

THE WITNESS: To Milanovich.

MR. BROWN: Yes, it was.

Q. (By Mr. Brown) Okay. Now, for instance, for bill 1982, with respect to the assessment – the tax on Lot 4 can you – it's not very clear, but can you read what the language says?

A. Northwest quarter of Lot 1 in Section 29, I

believe, portion of Lot 3, the northeast quarter, portion of Lot 4 – or Lot 3, all of Lot 4 excluding 11.5 acres of right-of-way.

Q. And what did the language excluding 11.5 acres right-of-way mean?

A. They were assessed for all of Lot 4 except for 11.5 acres of right-of-way which went through it.

Q. So would it be fair to state that, for the period from1982 through 1994, with the exception of the time the assessment to the Milanoviches was changed, being the years 1986 to 1989, did that language appear in all the remaining Treasurer's bills?

A. It did.

Q. And did that mean that where that language appears, with the exception of years that are noted, that Milanoviches were not assessed for that 11 and a half acres of property?

A. The assessment records shows that.

Q. And I assume the policy of the State is to assess all the assessable taxes, or all the assessable property, and collect taxes; is that correct?

A. It's our responsibility to value all property and then pass that information of valuation to the County. The County is responsible for the collection of the taxes.

Q. So would it be fair to say that someone else was assessed for the 11 and a half acres?

A. Yes.

Q. And do you know who that would have been?

A. According to the records, it had been assessed to the Milwaukee Railroad and then subsequent owners.

Q. Ms. Cooney, directing your attention to the next paper in that exhibit, what does that purport to be?

A. It's a tax bill for the year 1988-89 to A & K Railroad for property owned by them.

Q. With respect to property located in Section 30, 2 North, 7 West; what did that do?

A. It – their ownership was assessed to that land in Section 30.

Q. And they were assessed on whatever their ownership was in that land; is that right?

A. Right, this land had been transferred from Milwaukee.

Q. and so far as your records show, what would that have been on the ownership of A & K and Lot 4?

A. It would have been 11.7 acres right-of-way.

Q. Would that have been the portion shown on Exhibit A here?

A. Yes.

Q. In pink and yellow?

A. The yellow part would have been the right-of-way going through there.

Q. But the right-of-way itself would not have comprised 11 and half acres, would it?

A. I'm not sure.

Q. In other words, your records don't reflect that?

A. No.

Q. It just shows that, in this – that the railroad paid taxes on 11 and a half acres in Lot 4; is that correct?

A. Right.

Q. Directing your attention to the next paper in that exhibit, what does that purport to be?

A. It's a letter to Dr. Milanovich from myself describing research that we had done on Government Lot 3 and 4 in Section 30, that we had double assessed 10.81 acres..

Q. And for how long had double assessment been going on 'till this letter?

A. 1986.

Q. And that was the only period of time of double assessment on this particular piece of property; is that right?

A. Yes.

Q. And then the next paper in the list of exhibits, tell us what that is, please?

A. It's a letter to Mike Bartoletti from myself regarding his ownership in Sections 19 and 30, describing to him the double assessment of that parcel.

Q. And this letter then was his notification, I take it, that the double assessment was being discontinued;

is that correct?

A. Yes.

Q. I believe you testified that your examination of the records indicated that there were no delinquent taxes on the part of the Milwaukee Railroad as to this portion; is that right?

A. There were none.

Q. And insofar as A & K Railroad was concerned, did that disclose any delinquencies?

.....

Testimony of Defendant Mike Bartoletti

MR. BROWN: You may examine.

CROSS-EXAMINATION

BY MR. HATCH:

Q. Dr. Bartoletti, when your father was testifying this morning, he indicated that he had 100 acres north of Lot 4, but that's not correct; is that right?

A. No, that is not – I'm sure he misspoke and meant south.

Q. He was thinking that his land was south and in what we call Lot 5 and 6?

A. Five, six, and there's another lot somewhere down there, too, which would be directly south.

Q. How much acreage did you and your father own north of Lot 4 in Section 19?

A. It was between 15 and 17

Q. And that's where your homesite is?

A. that's where it is.

Q. That's where you built your home?

A. Yes.

Q. Do you remember whethere there was any fences between your property and the Lot No. 4?

A. Some of – there's always been a fence along the railroad. Now, Lot 4 – so some of my fence is contiguous with the railroad. That would go another 15 to 20 feet; and then, as you get, I guess, would be west of there, then there is a fence at the boundaries, yes. There's an owner in there. That actually is incorrect. Does that say Kissock or –

Q. It says –

A. North of Lot 4.

Q. North of Lot 4 says Paul and Mary Gosden.

A. That is not correct. That is Sherry and somebody Kissock.

Q. Kissock?

A. Yes. Gosden is correct on the right side, correct.

Q. You moved out there in 1983?

A. I did, yes.

Q. You've heard Dr. Milanovich testify that he had this all fenced in 1980?

A. Not contiguous.

Q. What wasn't contiguous?

A. He interrupted the fence when you got to the railroad right-of-way fence and walked across the fence and walked up to the other side; and that's what I meant by contiguous.

Q. So there's track there and other things that trains, or maybe work crews were working on that?

A. Yes, and A K Salvage made a road adjacent to the railroad itself so that it could sell these ties.

Q. Did Dr. – Did you and Dr. Milanovich have a conversation prior to your ownership, where it was okay for you to water your horses on that property?

A. I don't believe it was prior to the ownership. We had a discussion that said, "For nominal fee of a dollar or something, you can use that water."
And he didn't own it, so I didn't figure I needed to do that.

Q. You base your ownership on whatever A & K Railroad gave you?

A. You bet.

Q. How much did you pay the A & K Railroad for what you bought in that property in that area?

A. I can't tell you that because I did not only buy the property in Section 30; I also purchased on the east side of the non dedicated road, a piece of railroad property

which – so total, I paid somewhere in the neighborhood – I paid $2,500.

Q. Twenty-five hundred dollars for how much land?

A. At that time, as I said before, AK Salvage said the only way they would sell the property is if they could deed everything that they owned in those sections. And I said, "I want a survey," and they said, "We won't do that. You can do it at your expense," because railroad surveys are quite costly, and I didn't think that was necessary.

Q. So you're talking about Section 19 and Section 30 as it appears on your deed?

A. Yes. Yes, 19.

Q. So you're talking about railroad right-of-way that continued on in Section 19?

A. Yes.

Q. And the railroad right-of-way in Section – you paid $2,500 for all of that?

A. Uh-huh. I had a discussion with Phil; and he says, "Geez, if I would have known it was for sale, I would have purchased it."